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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

RICARDO CERVANTES, Plaintiff and Appellant, v. CRAIG E. JOHNSON et al., Defendants and Respondents.	A123299 (Alameda County Super. Ct. No. HG08374653)

This is an appeal from a judgment of dismissal following the trial court's decision to sustain without leave to amend the demurrers filed by respondents Craig E. Johnson, M.D., and Washington Hospital (collectively, respondents). We agree with the trial court that appellant Ricardo Cervantes cannot state a cause of action for negligent infliction of emotional distress under the circumstances of this case. Accordingly, for the reasons set forth below, we affirm the judgment of dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

This lawsuit stems from the stillbirth of the biological child of appellant and Adelayda Gonzalez on December 27, 2006, while Gonzalez was receiving prenatal care from respondents.[1]

On March 4, 2008, appellant and Gonzalez filed a complaint against respondents for medical negligence as to Gonzalez only and for negligent infliction of emotional

[1] Appellant and Gonzalez had lived together for ten years, had a ten-year-old son, and considered themselves husband and wife despite having never been officially married.

distress as to Gonzalez and appellant. The complaint was subsequently twice amended, adding causes of actions as to Gonzalez and appellant for intentional infliction of emotional distress against both respondents and for negligent hiring, training, supervision and/or retention against Washington Hospital only, and limiting the cause of action for negligent infliction of emotional distress to appellant only.

According to the second amended complaint, Gonzalez was admitted to Washington Hospital (the hospital) on December 25, 2006, when, at 23 1/2 weeks of pregnancy, she began leaking what she feared was amniotic fluid from her vagina.[2] At the hospital emergency room, Gonzalez, accompanied by appellant, informed a nurse that her water had broken, and was instructed to undress and lay in the hospital bed. Gonzalez had earlier placed tissue between her legs to catch the fluid, and the nurse told her to leave the tissue in the bathroom so it could be tested.

The nurse noted in medical records that Gonzalez had suffered a Premature Rupture of Membranes (PROM), a possibly fatal condition occurring in some pregnant women. According to the pleading, PROM is properly treated by performing a simple Nitrazine test to confirm the presence of amniotic fluid, or by performing an ultra sound or sterile vaginal exam to check the level of amniotic fluid remaining in the woman's uterus. In addition, where it is confirmed that a patient has suffered PROM, the patient should receive immediate antibiotic treatment to prevent infection, and should be continuously monitored for signs of infection or fetal distress.

Gonzalez received none of these tests or treatments. Rather, Gonzalez was told by the nurse that respondent Dr. Johnson, the physician providing her prenatal care, would be contacted for further instructions. When the nurse returned an hour later, the nurse

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[2] The allegations set forth in this opinion are taken from the second amended complaint, the subject of the trial court's ruling being challenged on appeal. Appellant filed a first amended complaint on May 1, 2008, after respondents demurred to the original complaint, prompting the trial court to take the demurrers off calendar. Thereafter, respondents demurred to the causes of action in the first amended complaint for negligent and intentional infliction of emotional distress, which the trial court sustained with leave to amend on July 25, 2007, prompting the filing of the second amended complaint on August 4, 2008.

told Gonzalez that she had spoken by phone with Dr. Johnson while he was on vacation, and that he had instructed Gonzalez to rest for the next two days, but that she could return to work on December 27, 2006. According to the nurse, Dr. Johnson further instructed Gonzalez that, if she began to bleed, she should return to the hospital immediately.

Gonzalez was then discharged from the hospital without further treatment. Gonzalez and appellant were concerned about this lack of treatment, but trusted the expertise of respondents.

The next day, December 26, 2006, Gonzalez continued to leak fluid and began to experience chills. On December 27, 2006, Gonzalez felt progressively worse, complaining of abdominal pain and cramping, fever, diarrhea and continued leaking of fluid. Gonzalez and appellant thus returned to the hospital emergency room, where Dr. Johnson was present and performed a Nitrazine test and ultrasound, confirming that Gonzalez was leaking amniotic fluid. Dr. Johnson diagnosed both Gonzalez and the unborn child with a serious infection known as chorioamnionitis. Dr. Johnson then informed Gonzalez and appellant that their unborn child had no chance of survival, and gave no satisfactory answer when asked by the couple whether intervention on December 25, 2006, would have prevented such a consequence.

With appellant present in the delivery room, Gonzalez was in labor from the morning of December 27, 2006, until late that evening, when she gave birth to their stillborn child. During this time, appellant and Gonzalez, who were greatly distressed, could observe the beating of their unborn child's heart on a fetal monitor, until it stopped beating about two hours before the delivery.

On or about May 29, 2007, appellant and Gonzalez presented a claim to the hospital for damages based on the events surrounding the stillbirth of their child. The hospital rejected their claim on June 27, 2007, prompting the filing of this lawsuit.

On August 15, 2008, Dr. Johnson demurred to the second amended complaint on the grounds that neither appellant nor Gonzalez could state a cause of action for intentional infliction of emotional distress, and that appellant could not state a cause of action for negligent infliction of emotional distress. The hospital thereafter demurred on

the same grounds, as well as on the ground that neither appellant nor Gonzalez could state a cause of action for negligent hiring, training, supervision and/or retention.

On September 23, 2008, the trial court sustained both respondents' demurrers without leave to amend. In doing so, the trial court found, among other things, that appellant failed to state a cause of action for negligent infliction of emotional distress under a direct victim theory because he did not allege a physician/patient relationship with respondents. Further, appellant failed to state such cause of action under a bystander theory because he did not witness the alleged injury-causing event (i.e., the failure to give proper medical attention on December 25, 2006); rather, he witnessed the *consequence* of the alleged injury-causing event (i.e., the stillbirth on December 27, 2006). Finally, the trial court found that appellant had not met his burden of showing how the complaint could be amended a fourth time to state a valid cause of action under either theory.

On January 8, 2009, the judgment of dismissal against appellant was entered, leading to this appeal.[3]

DISCUSSION

Appellant argues on appeal that the trial court erred in sustaining the demurrers to the second amended complaint because the allegations therein were sufficient to state a cause of action for negligent infliction of emotional distress.[4] Appellant reasons that he is entitled to recover for his emotional distress as a direct victim based on his employment relationship with respondents, and as a bystander based on his presence in the emergency room and his observation of the fetal heartbeat and the heartbeat's

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[3] Gonzalez's lawsuit against both respondents for medical negligence and against the hospital for negligent hiring, training, supervision and/or retention continues in the trial court.

[4] Appellant puts forth no substantive argument on appeal with respect to the trial court's dismissal of his causes of action for intentional infliction of emotional distress and negligent hiring, training, supervision and/or retention. Rather, appellant states that, should we find in his favor with respect to the cause of action for negligent infliction of emotional distress, we should then also find in his favor with respect to the cause of action for negligent hiring, training, supervision and/or retention based upon the existence of the same alleged duty owed by the hospital.

subsequent cessation when his unborn child died. Appellant further reasons that denying him recovery for negligent infliction of emotional distress would amount to gender discrimination and denial of equal protection under the law.

In considering appellant's arguments, "we apply well-established rules governing the appellate review of an order sustaining a demurrer. We thus must 'give[] the complaint a reasonable interpretation, and treat[] the demurrer as admitting all material facts properly pleaded.' (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, [966-] 967 [9 Cal.Rptr.2d 92, 831 P.2d. 317]. . . .) Because only factual allegations are considered on demurrer, we must disregard any 'contentions, deductions or conclusions of fact or law alleged [in the complaint].' (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713 [63 Cal.Rptr.2d 724, 433 P.2d. 732].)" (*People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957.)

"Where, as here, the trial court has sustained a demurrer, we must determine whether the plaintiff has pleaded facts sufficient to state a cause of action. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr.2d 718, 703 P.2d. 58] (*Blank*).) 'The judgment must be affirmed "if any one of the several grounds of demurrer is well taken." [Citation.]' (*Aubry, supra*, 2 Cal.4th at p. 967.)" (*People ex rel. Gallegos v. Pacific Lumber Co., supra,* 158 Cal.App.4th at p. 957.)

"Finally, where, [also] as here, the demurrer was sustained without leave to amend, we must determine whether the plaintiff has proven a reasonable possibility that the pleading's defect can be cured by amendment. (*Blank, supra,* 39 Cal.3d at p. 318.) If the plaintiff meets that burden, we must reverse the trial court's order as an abuse of discretion. (*Ibid.*)" (*People ex rel. Gallegos v. Pacific Lumber Co., supra,* 158 Cal.App.4th at p. 957.)

In California, the law regarding negligent infliction of emotional distress has been explained by reference to two theories of recovery. The first theory of recovery, the "bystander" theory, is based on the plaintiff's status as a percipient witness to the injury of a close relative that was caused by the defendant's negligence. (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 647, 667-668 (*Thing*).) The second theory of recovery, the "direct

victim" theory, is based on a preexisting relationship between the plaintiff and the defendant where the defendant's negligence results in another person's injury. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1073 (*Burgess*).)

" 'The *negligent* causing of emotional distress is not an independent tort, but the tort of *negligence*. [Citation.] The traditional elements of duty, breach of duty, causation, and damages apply. [¶] Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability. [Citation.]' (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc*. (1989) 48 Cal.3d 583, 588 [257 Cal.Rptr. 98, 770 P.2d 278], italics in the original, internal quotation marks omitted [hereafter *Marlene F*.]; accord, *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 882, 884 [2 Cal.Rptr.2d 79, 820 P.2d 181] [hereafter *Christensen*].)" (*Burgess, supra,* 2 Cal.4th at p. 1072.) Further, damages for negligent infliction of emotional distress are recoverable even in the absence of physical injury or impact to the plaintiff. (*Id*. at pp. 1074, 1079.)

"The distinction between the 'bystander' and 'direct victim' cases is found in the source of the duty owed by the defendant to the plaintiff." (*Burgess, supra,* 2 Cal.4th at p. 1072.) "The existence of a duty is a question of law, and that duty must be one that the defendant has assumed, has been imposed upon the defendant as a matter of law, or arises out of the defendant's preexisting relationship with the plaintiff." (*Klein v. Children's Hospital Medical Center* (1996) 46 Cal.App.4th 889, 895.) While direct victim cases are premised on a preexisting relationship between the parties, bystander cases are premised on the defendant's violation of a duty not to negligently cause emotional distress to plaintiffs who observe conduct which causes harm to another. (*Burgess, supra,* 2 Cal.4th at p. 1073.)

Here, appellant relies on both theories in attempting to set forth a negligent infliction of emotional distress cause of action. We address each in turn.

I. The Direct Victim Theory.

Appellant claims to have stated a cause of action for negligent infliction of emotional distress as a direct victim of respondents' negligence. Appellant reasons that

such a cause of action "arises from [his] own relationship with the doctor, that is, from his employment of the doctor to provide proper obstetrical care for his unborn child and flows from his own parental interests of having eagerly anticipated and looked forward to the birth of his daughter and having been aware of and perceived his unborn child within [the mother's] body." We disagree.

We do not doubt that appellant suffered severe emotional distress as a result of the stillbirth of his unborn child. However, that is only the start of our inquiry. As we have just explained, "whether respondents' alleged negligence permits appellant[] to recover damages for [his] . . . emotional distress is dependent upon the traditional tort analysis of duty, breach of duty, causation and damages, in which foreseeability assumes a minor role." (*Klein, supra*, 46 Cal.App.4th at p. 895.) We thus turn to the issue of duty.

In *Burgess*, the California Supreme Court permitted a mother to recover emotional distress damages under a direct victim theory after the negligent delivery of her child because "[mother] established a physician-patient relationship with [defendant physician] for medical care which was directed not only to her, but also to her fetus. . . . Moreover, during pregnancy and delivery it is axiomatic that any treatment for [the baby] necessarily implicated [mother's] participation since access to [the baby] could only be accomplished with [mother's] consent and with impact to her body." (*Burgess*, *supra*, 2 Cal.4th at p. 1076.)

In so holding, the *Burgess* court was not asked to address whether the father could also recover as a direct victim. Nonetheless, in dicta, the court observed that, with respect to recovery of emotional distress damages when a child is negligently injured during prenatal care and birth, "the physician-patient relationship critical to a mother's cause of action is almost always absent in a father's claim. It, therefore, appears that a father must meet the criteria [for bystanders] set forth in *Thing, supra*, 48 Cal.3d 644, if he is to state a viable claim."[5] (*Burgess, supra*, 2 Cal.4th at p. 1078, fn. 8.)

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[5] The criteria for recovering under a bystander theory, set forth in *Thing, supra*, 48 Cal.3d 644, are discussed, *post*, in section II.

In addition, responding to the defendant's concerns about expanding liability for emotional distress in cases involving negligent prenatal care and birth, the *Burgess* court noted that "[t]he only potential plaintiffs are pregnant women *with whom the defendant has established a physician-patient relationship*. Contrary to [defendant physician's] assertions, there is no possibility, much less a specter, of unlimited liability presented by these unique cases." (*Burgess, supra*, 2 Cal.4th at p. 1084 (italics added). Accord *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc*. (1989) 48 Cal.3d 583, 590-591 (*Marlene F.*) [allowing recovery for a mother's emotional distress in a medical malpractice case involving mistreatment of a child where the defendant psychotherapist was treating both mother and child for intrafamily difficulties].)

A year after deciding *Burgess*, the California Supreme Court revisited the issue of direct victim recovery in deciding *Huggins v. Longs Drug Stores California, Inc.* (1993) 6 Cal.4th 124 (*Huggins*). There, both parents sought to recover damages for negligent infliction of emotional distress after their child was injured when a pharmacist prescribed the wrong dosage of medicine. (*Huggins, supra*, 6 Cal.4th at p. 126.) The parents theorized they were direct victims of the pharmacist's negligence because the pharmacist knew or should have known that they, as closely-related caregivers, would be administering the medicine to their child according to the pharmacist's instructions. (*Id.* at pp. 126-127.)

The California Supreme Court disagreed, reiterating that only where a parent qualifies as a *patient* of the defendant healthcare provider can the parent recover for emotional distress under the direct victim theory. (*Huggins, supra*, 6 Cal.4th at pp. 131-132.) In doing so, the court emphasized that the mere existence of a contractual relationship between a parent and medical care provider for the care of a child does not impose a duty on the healthcare provider to the parent. (*Ibid*.) In *Huggins*, "the end and aim of the prescription dispensed by defendant was to provide medical treatment for plaintiffs' infant son . . . . He, not plaintiffs, was the only patient being served by the transaction." (*Id*. at p. 132.) Accordingly, the court concluded, "[b]ecause plaintiffs were not the patients for whom defendant dispensed the prescribed medication, they

cannot recover as direct victims of defendant's negligence."[6] (*Id.* at p. 133. Accord *Klein, supra,* 46 Cal.App.4th at pp. 898-899 [following *Huggins* in declining to permit parents to recover for negligent infliction of emotional distress based upon the absence of a duty owed by the healthcare provider to the parents where their child was negligently misdiagnosed with a lethal form of cancer].)

This California Supreme Court authority, we conclude, defeats appellant's claim for emotional distress damages under a direct victim theory. As mentioned above, appellant argues that a duty arose in this case from his own preexisting relationship with respondents because he employed them to provide prenatal care for his unborn child and because he "eagerly anticipated" the birth and "perceived" his unborn child within the mother's body. However, under *Huggins* and *Burgess*, "the mere existence of a contractual relationship between parents and medical care providers for medical care of children does not impose a duty on the health care providers to the parents." (*Klein, supra,* 46 Cal.App.4th at p. 896. Rather, there must be a *patient*-medical care provider relationship to recover under this theory, which appellant lacked. (*Ibid.* See also *Ess v. Eskaton Properties, Inc.* (2002) 97 Cal.App.4th 120, 128 ["to support a direct victim cause of action for emotional distress, the plaintiff must himself or herself be a patient of the defendant caregiver"]; *Aguirre-Alvarez v. Regents of University of California* (1998) 67 Cal.App.4th 1058, 1067-1069 [similar].)

Specifically, respondents were not providing medical treatment or any other medical services to appellant. Rather, respondents were providing treatment and services

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[6] In both *Burgess* and *Huggins*, the California Supreme Court sought to clarify its earlier holding in *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 922-923 (*Molien*). In *Molien*, the court concluded that a doctor owed a duty of care to a husband when his wife, the doctor's patient, was misdiagnosed with syphilis and was directed to tell her husband of her condition and to advise him to seek treatment. (*Id.* at p. 923.) In *Huggins*, the court explained that the doctor at issue in *Molien* did not owe a duty to the husband based on the doctor's misdiagnosis of his wife and the husband's resulting emotional distress, but because the doctor assumed such duty by "direct[ing] his patient, the wife, to advise the plaintiff husband of the diagnosis." (*Huggins, supra,* 6 Cal.4th at p. 130.)

only to Gonzalez and their unborn child. As such, appellant cannot prove that the requisite preexisting relationship existed between he and respondents. (*Huggins, supra*, 6 Cal.4th at pp. 131-132; *Burgess, supra*, 2 Cal.4th at p. 1084. Accord *Marlene F., supra*, 48 Cal.3d at pp. 590-591; *Klein, supra*, 46 Cal.App.4th at p. 898-899.)

In seeking to avoid this limitation imposed pursuant to *Burgess* and *Huggins*, appellant directs us to two appellate decisions, *Newton v. Kaiser Foundation Hospitals* (1986) 184 Cal.App.3d 386 (*Newton*), and *Andalon v. Superior Court* (1984) 162 Cal.App.3d 600 (*Andalon*). In *Andalon*, the court allowed both parents to recover for emotional distress that arose from the defendant's negligent failure to recommend a prenatal test to the mother that led to the unwanted birth of a child with Down's Syndrome. (162 Cal.App.3d at p. 603.) In doing so, the court noted that "[the father's] interest in the receipt of information and advice on this topic mirrors hers. His injury is not merely derivative of [the mother's] injury but flows from his role as a participant in the reproductive life of the marital couple and its lawful choices." (*Id*. at p. 611.) As such, the court decided the father could recover under the direct victim theory as "a direct beneficiary of tort-duty imposed by virtue of the doctor-patient relationship" between the mother and the defendant. (*Ibid*.)

In *Newton*, the appellate court allowed both parents to recover emotional distress damages based upon injuries sustained by their child during childbirth. (184 Cal.App.3d at p. 387.) Following *Andalon*, the court held that "mother had a contract with [defendant hospital] by which it undertook, for consideration, to provide care and treatment for the delivery of a healthy fetus. [Defendant hospital's] contract was the source of its duty and a determination of foreseeability is unnecessary to establish a duty of care. Under *Andalon*, that duty extended to the father as well." (*Id*. at p. 392.)

As respondents note, *Andalon* and *Newton* predate the California Supreme Court's decisions in *Burgess* and *Huggins*. As such, we decline to waiver from our strict

application of the legal principles set forth by that controlling high court authority in this case.[7]

In any event, appellate courts have limited *Andalon* to its facts – *i.e.*, the unique situation where a physician's negligence in failing to recommend a prenatal test that would have revealed Down Syndrome precluded the parents, including the father, from exercising their lawful reproductive choice as a married couple to terminate the pregnancy. (See *Martinez v. County of Los Angeles* (1986) 186 Cal.App.3d 884, 891; *Schwarz v. Regents of University of California* (1990) 226 Cal.App.3d 149, 165.) Here, to the contrary, the respondents' alleged misdiagnosis of Gonzalez and the unborn child did not preclude appellant from exercising a medical treatment-related choice that was otherwise his to make. (Cf. *Burgess, supra*, 2 Cal.4th at p. 1080 ["During pregnancy, the mother and child are a unique physical unit. The welfare of each is 'intertwined and inseparable' "].)

Appellate courts have also criticized *Newton* and *Andalon* for expanding the direct victim theory beyond the scope delineated by the controlling case law. (E.g., *Martinez, supra,* 186 Cal.App.3d at p. 892 ["declin[ing] to adopt the analysis in *Newton* as we believe it to be an unwarranted extension of *Andalon* and results in a boundless liability for emotional distress of parents who 'contract' for delivery of, or care for, a child who becomes a victim of medical malpractice"]; *Schwarz, supra*, 226 Cal.App.3d at pp. 167-168 [declining to follow *Newton* and noting that, "[r]educed to its essentials, *Newton* . . .

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[7] Appellant attempts to distinguish *Huggins* on the basis that "there were public policy considerations present in *Huggins* which are not present in the case before the court, to not venture into new territories of tort liability with respect to the obligations that a pharmacist assumes when he undertakes to fill a prescription." In doing so, appellant ignores the California Supreme Court's express refusal to distinguish between pharmacists and other health care providers for purposes of the direct victim analysis: "There is no material distinction between the professional duties of pharmacists and the duties of other health care providers that allows the parent of a child patient for whom a prescription is negligently filled to recover from the pharmacist as a direct victim. The Legislature has declared the practice of pharmacy to be 'a dynamic patient-oriented health service.' (Bus. & Prof. Code, § 4046, subd. (b).)." (*Huggins, supra,* 6 Cal.4th at p. 132.)

stands for the proposition that liability will be imposed whenever a party has a contractual relationship with the defendant that imposes a duty of care and an intimate relationship with the plaintiff that makes the plaintiff's emotional distress foreseeable"]; *Golstein v. Superior Court* (1990) 223 Cal.App.3d 1415, 1427 fn. 4.) We agree with these decisions, and thus decline appellant's request that we follow *Andalon* and *Newton* in this case.

We thus confirm our decision that appellant cannot state a claim based on the direct victim theory and proceed to the next issue.

II. The Bystander Theory.

Appellant contends that, while his negligent infliction of emotional distress claim rests "primarily" on a direct victim theory, his complaint "may suffice to also state a claim on the bystander theory." In doing so, appellant reasons that he "sensorily perceived fetal movement and the cessation of it in Ms. Gonzalez' [*sic*] body, and also that he 'felt concern about her lack of treatment at the hospital . . . . [quoting the second amended complaint]." We again disagree.

The California Supreme Court recognizes that, in strictly limited cases, an award of damages is justified for serious emotional distress "caused by awareness of the negligent infliction of injury to a close relative." (*Thing, supra*, 48 Cal.3d at p. 667.) However, because in bystander cases "the class of potential plaintiffs could be limitless, resulting in the imposition of liability out of all proportion to the culpability of the defendant, [the California Supreme Court] has circumscribed the class of bystanders to whom a defendant owes a duty to avoid negligently inflicting emotional distress. These limits are set forth in *Thing* as follows: 'In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness.' ([*Thing, supra*,] 48 Cal.3d at p. 647.)" (*Burgess, supra*, 2 Cal.4th at p. 1073.)

Accordingly, under *Thing*, if the bystander does not " 'observ[e] both the defendant's conduct and the resulting injury' " and also have an " 'aware[ness] at the time that the conduct is causing the injury,' the [bystander] cannot recover. (*Thing, supra*, 48 Cal.3d at p. 661.)." (*Burgess, supra*, 2 Cal.4th at p. 1082.)

Appellant, we conclude, cannot meet this standard. According to the second amended complaint, Gonzalez sought treatment from respondents on December 25, 2006, after she began leaking fluid that she feared was amniotic fluid. Gonzalez was thereafter instructed by respondents to go home and rest, without receiving further treatment. "Despite feeling concerned about [Gonzalez's] lack of treatment at the hospital, plaintiffs trusted the expertise of the defendants."

The following day, December 26, 2006, Gonzalez experienced chills. Then, on December 27, 2006, Gonzalez returned to the hospital with appellant when her condition worsened and she began experiencing abdominal pain and cramping, fever and diarrhea. At that time, Dr. Johnson diagnosed Gonzalez and her unborn child with the infection that ultimately caused the child's stillbirth. The second amended complaint makes it clear that it was "*[a]fter plaintiffs' conversation with defendant Craig Johnson M.D. on the morning of December 27, 2006, [that] they immediately realized that the failure of defendants to treat Ms. Gonzalez on December 25, 2006, caused the infection* and with this knowledge, plaintiffs were forced to witness the slow demise of their baby [¶] . . . [¶] . . . and plaintiffs watched Baby Jamary die because her heart was still beating until . . . defendant Craig Johnson M.D. turned off the fetal monitor." (Italics added.)

Based on these allegations, appellant does not meet the three criteria set forth in *Thing* because he did not observe respondents' alleged negligent conduct and the resulting injury to his unborn child while being " 'aware at the time that the conduct is causing the injury.' " (*Thing, supra*, 48 Cal.3d at p. 661; *Burgess, supra*, 2 Cal.4th at p. 1082.) Rather, respondents' alleged negligent acts occurred on December 25, 2006, when Gonzalez was sent home from the hospital without further efforts to diagnose and treat her condition. Those negligent acts, in turn, caused Gonzalez to contract the serious infection that led to the stillbirth of appellant's unborn child on December 27, 2006,

while appellant was present in the delivery room witnessing Gonzalez's distress. Thus, as the trial court found, appellant was present for and observed the consequences of the injury-causing acts, but not the injury-causing acts themselves.

The facts of this case are similar to those in *Justus v. Atchison* (1977) 19 Cal.3d 564 (*Justus*), disapproved on other grounds in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171. There, two husbands sought to recover damages for negligent infliction of emotional distress after the negligence of physicians treating their wives led to the stillbirth of their unborn children. (*Justus, supra,* 19 Cal.3d at pp. 584-585.) Like appellant, the husbands in *Justus* were present in the delivery room, knew something was wrong during the delivery process, and observed their wives' distress. Further, the husbands were immediately told that their unborn children had not survived after their death occurred. (*Ibid*.) The California Supreme Court nonetheless denied recovery to the husbands on the ground that, although they were physically present in the delivery room, they did not witness the injuries to the victims, but rather were told of them after the fact. In so concluding, the court noted that "[the death of the fetus] was by its very nature hidden from [the husband's] contemporaneous perception . . . ." (*Id*. at p. 584.)

Following *Justus*, the appellate court in *Golstein* held that "[i]n the case of an event which cannot be perceived, distress recovery is not allowed." (*Golstein, supra,* 223 Cal.App.3d at p. 1427.) The appellate court thus precluded parents from recovering under a bystander theory when their child was given a lethal dosage of radiation because "the injury-causing event – the excessive irradiation – was incapable of sensory perception." (*Id*. at p. 1417.)

Appellant tries to distinguish *Justus* and its progeny on the ground that, in those cases, parents were not aware until after the fact that an injury had occurred, whereas in this case appellant observed an "ongoing injury" that later resulted in the stillbirth. We reject appellant's argument. As we have just explained, the alleged injury-causing event was the negligent care and treatment respondents provided (or, more accurately, failed to provide) Gonzalez and the unborn child on December 25, 2006. The injury was an internal infection called chorioamnionitis that was diagnosed two days later on

December 27, 2006. Like the fetal injuries alleged in *Justus* and the radiation injury alleged in *Golstein*, the internal infection allegedly suffered by the fetus in this case, by its nature, could not have been observed by appellant. Characterizing the injury as "ongoing" does not alter this undeniable fact. And California Supreme Court authority is clear that under such circumstances recovery is barred. (*Justus, supra*, 19 Cal.3d at p. 584; *Thing, supra*, 48 Cal.3d at pp. 661, 668-669. See also *Meighan v. Shore* (1995) 34 Cal.App.4th 1025, 1046 ["understanding perception of the injury-causing event is essential, and if it cannot be perceived, recovery cannot be allowed"].) As such, appellant's claim under the bystander theory also fails.

III. Constitutional Arguments.

Finally, we reject appellant's constitutional arguments that barring him from recovering for emotional distress under these circumstances amounts to gender discrimination and a denial of equal protection under the law.

As appellant points out, "all persons similarly circumstanced shall be treated alike" under the law. (*Plyler v. Doe* (1982) 457 U.S. 202, 216.) Further, gender-based distinctions must "serve important governmental objectives and must be substantially related to achievement of those objectives." (*Craig v. Boren* (1976) 429 U.S. 190, 197.) The dismissal of appellant from this case, however, violated neither of these principles. The controlling California law, set forth above and followed by both this court and the trial court, does not treat similarly-situated persons differently or distinguish among persons based upon their gender. Rather, in the case of a direct victim, the right to recover is limited in a neutral fashion to the circumstance where the defendant breaches a legal duty owed to the plaintiff that results in serious emotional distress to the plaintiff. (E.g., *Burgess, supra,* 2 Cal.4th at pp. 1072-1073.) This rule applies irrespective of whether the plaintiff is male or female, husband or wife. (*Ibid*.) In the case of a bystander, the right to recover is limited in a neutral fashion to the circumstances where the plaintiff has a close relationship to the injury victim, the plaintiff observes the injury-producing event when it occurs and is contemporaneously aware that the victim is being injured, and serious emotional distress results. (E.g., *Thing, supra,* 48 Cal.3d at pp. 667-

668.) Again, this rule applies irrespective of whether the plaintiff is male or female, husband or wife. (*Ibid*.) Accordingly, appellant's constitutional arguments lack merit.

As the California Supreme Court has noted, "If a child is seriously injured by erroneous medical treatment caused by professional negligence, the parent is practically certain to suffer correspondingly serious emotional distress." (*Huggins, supra,* 6 Cal.4th at p. 133.) This is especially true where the parent observes suffering from such injury. (See *Burgess, supra*, 2 Cal.4th at pp.1084-1085.) However, these facts alone do not warrant establishing a new right of recovery for the parent's emotional distress. (See *Huggins, supra*, 6 Cal.4th at p. 133 [noting that expanding recovery for the emotional distress of parents when their child is harmed by the negligence of a healthcare provider beyond the limits prescribed by the California Supreme Court "not only would increase medical malpractice insurance costs but also would tend to 'inject undesirable self-protective reservations' impairing the provision of optimal care to the patient"]; *Thing, supra*, 48 Cal.3d at pp. 663-664 [similar].)

Accordingly, we conclude the trial court properly sustained the demurrers to appellant's second amended complaint without leave to amend.[8]

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[8] Appellant does not challenge the trial court's decision to sustain the demurrers without affording him the opportunity to amend his complaint for a fourth time. Moreover, appellant has set forth no facts to establish that he could in fact amend his complaint to state a valid claim for negligent infliction of emotional distress under the circumstances of this case. (See *Blank, supra,* 39 Cal.3d at p. 318 [plaintiff has the burden to prove a reasonable possibility that the pleading's defect can be cured by amendment].) As such, we do not address the propriety of the trial court's decision in this regard.

DISPOSITION

The judgment is affirmed.

_____
Jenkins, J.

We concur:

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McGuiness, P. J.

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Siggins, J.